BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
MARC SOBEL	)	WT DOCKET NO. 97-56
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor Of Certain Finder's Preferences	)	
	)	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	)	
	)	
Licensees of Certain Part 90 Stations in the Los Angeles Area	)	

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY BRIEF

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SUMMARY

The Presiding Judge correctly found that Sobel misrepresented material facts and lacked candor in two affidavits submitted to the Commission in January, 1995. Sobel and Kay argue that the record does not show the existence of an intent to deceive, but their arguments ignore or mischaracterize critical evidence. Sobel understood that the Commission wanted information concerning the relationship between himself and Kay. Sobel, however, offered to the Commission affidavits that contained misrepresentations and offered a wholly misleading picture of the relationship between Sobel and Kay. Sobel claimed that Kay had no interest in any station or license of which Sobel was the licensee when Sobel knew that the statement was false. Several other statements in the affidavits were also misleading. Sobel's explanations for these statements at the hearing were illogical and inconsistent.

The Presiding Judge also correctly found that Sobel has engaged in an unauthorized transfer of control by allowing James A. Kay, Jr. (Kay) to control the 800 MHz stations licensed to Sobel. Sobel and Kay first entered into an oral agreement which allowed Kay to control Sobel's 800 MHz stations. When the Commission raised questions about the relationship between Sobel and Kay, they executed a written agreement. Kay has the unilateral authority to extend the agreement for up to 50 years. Kay controls virtually every aspect of the stations. Kay controlled the application filing process and provided the equipment and money needed to construct the stations. Kay and his employees sell the air time on the stations, bill the customers, collect from the customers, work with the customers, and work on the equipment. Sobel's involvement in the stations is as a contractor selected

and paid by Kay to service and maintain repeaters. Kay controls the major policy decisions relating to the stations. The employees who work on the stations are hired, supervised, and fired by Kay. Kay pays all the operating expenses relating to the stations, and he has received all the operating revenue from the stations. Kay can purchase the stations (which a third party offered to buy for $100,000 a station--$1.5 million total), for $500 each during the term of the agreement. Sobel, on the other hand, cannot sell the stations without Kay's permission. Kay has bought and sold "Sobel" stations without Sobel knowing the purchase or sale prices. Notwithstanding these facts, Sobel and Kay argue that the Presiding Judge misapplied the standards contained in the Intermountain Microwave case for determining whether an unauthorized transfer of control has taken place. In fact, the Presiding Judge correctly applied the Intermountain factors, and it is Sobel and Kay who misinterpret the factors. When the record is objectively viewed, there is no doubt that Kay holds absolute control over the Management Agreement stations.

Sobel's claim that the Hearing Designation Order in this case was issued in violation of the Administrative Procedure Act must be rejected because Sobel's conduct was "willful" within the meaning of the Administrative Procedure Act and the Communications Act.

In light of Sobel's repeated misrepresentations and lack of candor, as well as his blatant violation of Section 310(d) of the Communications Act, the Presiding Judge properly concluded that the proper sanction for his blatant misconduct was revocation of all his licenses.

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To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY BRIEF

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now replies to the exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 97D-13 (released November 28, 1997) (I.D.) filed by Marc D. Sobel (Sobel) and James A. Kay, Jr. (Kay) on January 12, 1998. The Bureau's failure to respond to a particular finding or argument made by Sobel or Kay is not a concession that the matter is meritorious.

I. COUNTERSTATEMENT OF THE CASE

2. Paragraphs 2-18 of the I.D. accurately set forth the background concerning the relationship between Marc Sobel (Sobel) and James A. Kay, Jr. (Kay). This case raises two primary issues: (1) whether Kay controlled 800 MHz land mobile licenses licensed to Sobel but "managed" by Kay pursuant to a management agreement (hereinafter, Management Agreement stations), and (2) whether Sobel misrepresented facts or lacked candor to the Commission concerning his relationship with Kay and Kay's role with respect to the

Management Agreement stations. The Presiding Judge concluded that Kay held de facto control of the Management Agreement stations in violation of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and that Sobel misrepresented facts and lacked candor to the Commission.

3. Sobel and Kay have known each other for about 20 years. Since the mid-to-late 1980s, Sobel has installed, maintained, and repaired Kay's approximately 350 repeaters as a contractor. Sobel will also occasionally help Kay by contacting a customer or another licensee. I.D., ¶9. Kay describes Sobel as "my hilltop repairman." Tr. 329. In the early 1990s, Sobel became interested in holding 800 MHz licenses himself and asked for Kay's help. Sobel relied on Kay to prepare 800 MHz applications for him. I.D., ¶11. At around the time the first of those stations was being constructed, Sobel and Kay reached an agreement as described in ¶¶12-13 of the I.D.:

> Kay would provide the equipment and money needed to construct and to operate Sobel's 800 MHz repeater stations, manage and market those stations, and pay all the operating expenses. Tr. 103-104. In return, Kay would receive the first $600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Sobel. Tr. 104. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. Tr. 187. . . Sobel performed most of the actual construction and installation. Tr. 107. Sobel performed that work as a contractor for Kay, and he was paid an hourly fee by Kay for that work. Tr. 106-108. . . Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Tr. 107, 351, 353.

Later, Kay and Sobel orally agreed that Kay would have the option to purchase the Management Agreement stations at any time for $500 each. I.D., ¶14.

4. Because of Kay's problems with the FCC and the fact that parties had complained about the business relationship between Sobel and Kay, Sobel asked Kay to have their oral

agreement reduced to writing. I.D., ¶16. On October 28, 1994, Kay and Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 38, Tr. 108.[1] The agreement automatically renews for five consecutive ten year periods unless Kay gives notice to the contrary at least ninety days prior to the end of the term. WTB Ex. 39, p. 6.

5. Sobel testified that the purpose of the Management Agreement was to show that he and Kay were separate entities doing business together. Tr. 258, 262-263. Sobel did not, however, file the written agreement with the Commission when he signed it. Tr. 303.

6. On December 6, 1994, little more than a month after the first management agreement was signed, Sobel wrote to Gary Stanford at the Federal Communications Commission office in Gettysburg, PA. WTB Ex. 46. Sobel complained that his applications were being held "due to my association with Mr. Kay", who was being investigated by the Commission. Sobel wrote:

> I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay. . .

WTB Ex. 46, P. 1 (emphasis in original).

7. WTB Ex. 41 is an affidavit signed by Sobel and dated January 11, 1995. In its entirety, the document reads as follows:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and

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[1] Kay and Sobel later entered into a second management agreement (WTB Ex. 39) because Kay originally forgot to pay Sobel a $100 option fee and because the first agreement omitted some stations and had some clerical errors. I.D., ¶17.

> I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.
> I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on Jan 11, 1995.

WTB Ex. 41. This affidavit was submitted to the Commission as part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 12, 1995, less than two weeks after Sobel and Kay signed the second management agreement. WTB Ex. 42 (Motion), Pp. 1, 25, Tr. 368. Another affidavit, identical except for the date of January 24, 1995, was submitted to the Commission because Kay's original motion was misfiled. WTB Ex. 44, I.D., ¶49. Sobel understood that the purpose of the affidavit was to attempt and have his licenses removed from the Kay hearing. I.D, ¶51. Nothing in the affidavits or the pleadings, WTB Exs. 41-44, provide any description of the actual relationship between Sobel and Kay with respect to the Management Agreement stations. I.D., ¶52.

II. MISREPRESENTATION/LACK OF CANDOR ISSUE

8. Sobel (Sobel Exceptions, pp. 17-24) and Kay (Kay Exceptions, pp. 20-22) contest the Presiding Judge's conclusion that Sobel misrepresented facts and lacked candor with the Commission concerning his relationship with Kay. Both parties argue that the record does not show that Sobel intended to deceive the Commission. Sobel and Kay ignore (1) crucial evidence that the Presiding Judge relied upon in finding intent to deceive and (2) the fundamental responsibility Sobel had to provide the Commission with complete and accurate information. The Presiding Judge correctly resolved the misrepresentation/lack of candor issue.

9. It is important to note that when Sobel made the statements in question, he knew that the Commission wanted to know the relationship between himself and Kay. Tr. 143, 151, 156. Indeed, he believed the reason the Commission was delaying the processing of his applications and finder's preference requests was because of the relationship he had with Kay. WTB Ex. 46. Sobel repeatedly argues in his exceptions that he was under no obligation to disclose the nature of his business relationship with Kay. Sobel Exceptions, p. 22 (Sobel "had no affirmative obligation to provide the challenged information . . ."), p. 23 ("The ALJ faults Sobel for not having disclosed the details of his business relationship with Kay. In a letter dated December 6, 1994, sent by Sobel to Mr. Gary Stanford of the FCC staff in Gettysburg, PA. WTB Ex. 46. [sic] Sobel was certainly under no such obligation, and it is unreasonable to expect that he would have done so at that time and in that context.") This argument merely demonstrates that Sobel still refuses to come to grips with one of his most elementary responsibilities as a Commission licensee: his affirmative obligation to provide the Commission with the information it needs. The Commission must be able to rely upon the completeness and accuracy of information provided to it by its licensees and applicants. The Commission's demand for absolute candor is itself all but absolute. Emison de Radio Balmaseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), rev. denied 8 FCC Rcd 4335 (1993). The Court of Appeals wrote in RKO General, Inc. v. FCC, 670 F.2d 215, 239 (D.C. Cir. 1981):

> Unlike a private party haled into court, or a corporation such as General Tire facing an investigation by the SEC, RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order

> to ascertain the truth," FCC Brief at 60, and license applicants may not indulge in common-law pleading strategies of their own devise.

Sobel knew that the Commission wanted a complete and accurate account of the relationship between himself and Kay. Since Sobel knew the Commission wanted that information, he had an affirmative obligation to provide that information. Indeed, since he understood that his applications were being held up because of that relationship, if he believed that his relationship with Kay was proper, he had every incentive to provide that information. Instead, he provided a series of false and misleading statements in an attempt to deceive the Commission about their relationship.

A. The January 1995 affidavits

10. The affidavits provided no meaningful information concerning the relationship between Sobel and Kay. See I.D., ¶52. Neither Sobel nor Kay even argue that full disclosure concerning their relationship was provided. The Presiding Judge concluded:

> Both Kay and Sobel had strong motive to withhold from the Commission the true nature of their business relationship. Sobel well realized that had he been truthful in his affidavit his requests for finders' preference would have been placed in jeopardy. The wording of the affidavit was calculated to ward off the Commission from being apprised of the true nature of the Kay - Sobel business relationship. Such dissembling may not be countenanced.

I.D., ¶73. While both Sobel and Kay challenge the Presiding Judge's conclusions concerning specific statements in the affidavit, they do not address the lack of candor inherent in the affidavit as a whole. Moreover, Sobel's explanations as to why he did not provide the information are inconsistent with his other testimony and not credible. Sobel's claim that the Presiding Judge was not the correct forum for disclosing that information (Tr. 143, 156) is unsupported and baseless. Sobel's affidavit was being submitted to the agency in an attempt

to remove some of Sobel's licenses from the scrutiny of a hearing proceeding. Sobel believed that the Commission's inclusion of some of his licenses in the Kay designation order was caused by the Commission having erroneous information. Under those circumstances, Sobel had a clear duty to provide the correct information and let the Presiding Judge in the Kay proceeding decide what action should be taken.

1. "Mr. Kay has no interest in any radio station or license of which I am the licensee."

11. Sobel challenges the Presiding Judge's conclusion that the preceding statement was a misrepresentation. Sobel argues (a) that he was solely responding to "the mistaken theory that Marc Sobel was a fictitious alias used by Kay"; (b) that he relied in good faith upon his lawyers, who prepared the affidavits; and (c) he considered the word "interest" to mean solely an "ownership" interest in the licenses. Sobel Exceptions, p. 19, see also Kay Exceptions, pp. 21-22. None of these defenses are consistent with the record.

12. Sobel knew the statement was false because of advice from Kay. As the Presiding Judge found in Paragraph 58 of the I.D. (emphasis added):

> Sobel testified that when he signed the affidavit, he thought about the word 'interest' because it was the only thing in here' that 'might have been questionable . . .' Tr. 156. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word 'interest.' Tr. 371. Kay told him that to the best of his knowledge, as it had been explained to him (emphasis added):
>
> > It referred to ownership as in a partnership or ownership of stock, **as having a direct financial stake in something.** Being an owner or a stockholder or direct party to something.
>
> Id. Sobel testified that Kay has a direct financial stake in the Management Agreement stations. Tr. 150.

Neither Sobel nor Kay even address these critical findings. Since Sobel knew that Kay had a

direct financial stake in his stations, and since he knew that a direct financial stake was an interest, he knew the statement was false when he signed the affidavit. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." Leflore Broadcasting Co. Inc. v. FCC, 636 F.2d 454, 462 (D.C. Cir. 1980). Second, Sobel's claim that he thought "interest" only meant an ownership interest in the licenses is inconsistent with Kay's testimony, as well as the plain language of the affidavit, which states that Kay has no interest in any of Sobel's **stations** or licenses. When this fact was pointed out to Sobel at the hearing, he made the incredible claim that Kay had no interest in any of the stations' equipment. I.D., ¶56, Tr. 147-148. In fact, the agreement provided that all of the equipment remained the sole and exclusive property of Kay. I.D., ¶56, WTB Ex. 39, p. 3. This patently disingenuous testimony is further proof that Sobel intended to deceive the Commission.

13. Sobel's argument that he relied on legal counsel to attest to the truth of the affidavit (Sobel Exceptions, p. 23) must fail because there is no evidence whatsoever that he relied upon counsel. There is no record evidence of any communications between Sobel and Brown & Schwaninger concerning the affidavit. Sobel asked Kay, not his attorneys, for advice. Sobel understood that he could add anything in the affidavit that he wanted to add. Tr. 141. Even if Sobel had in some way relied upon counsel, reliance on counsel is not an excuse for a clear breach of duty by a licensee. RKO General, Inc. v. FCC, supra, 670 F.2d at 231. There can be no clearer breach of duty than to knowingly submit a false statement to the Commission. Accordingly, the Presiding Judge's conclusion that Sobel intended to deceive the Commission with this statement must be affirmed.

2. Sobel is "not an employer or employee of Mr. Kay."

Sobel argues that it was not deceptive to state that Sobel was not Kay's employee without disclosing that Sobel performed extensive services for Kay as a contractor selected and paid by Kay (including when Sobel was working on stations licensed to himself). Sobel Exceptions, pp. 19-20. He argues that when he used the term "employee", he meant it in the "literal" sense of employment law and IRS regulations. Id. Sobel's reliance on IRS guidelines is disingenuous. The relevant and meaningful information that the FCC was entitled to know was that Sobel devoted considerable time to working for Kay and that when Sobel worked on stations licensed to himself, he did so as a contractor selected and paid by Kay. In the common definition of the word "employ", "to use or engage the services of",[2] Kay employed Sobel. Whether the statement is considered an affirmative misrepresentation (because Kay did employ Sobel), or whether the unqualified statement, albeit technically correct, constitutes lack of candor (because it fails to provide the material fact that Sobel did work for Kay) (as in RKO General, Inc. v. FCC, supra), Sobel proffered this statement with the intent of deceiving the Commission and obfuscating the true facts.

B. The Management Agreement

14. The Presiding Judge concluded that Sobel's claims concerning his written management agreement with Kay exhibited a lack of candor. I.D., ¶74. As noted in Paragraph 62 of the I.D., Sobel testified that the agreement was drafted to explain the relationship between Sobel and Kay. Tr. 301. Sobel did not file the agreement with the Commission, however, until he was directed to by the Commission in 1996. Tr. 313-314.

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[2] Meriam Webster's Collegiate Dictionary, Tenth Edition, 1994, P. 379.

Sobel argues that no lack of candor can be found because (a) "there was no particular occasion for Sobel to" submit the agreement, (b) the Presiding Judge misunderstood Sobel's admittedly incorrect testimony that Kay submitted the agreement as part of Kay's motion to enlarge issues, and (c) Kay produced the agreement in discovery in the Kay proceeding in March of 1995. Sobel Exceptions, pp. 21-22. None of these arguments have any merit.[3]

15. Sobel had ample opportunities to present the management agreement to the Commission. Indeed, if he believed that the agreement fully complied with the Commission's rules and policies, he had every incentive to do so. He believed his applications were being held up because of his relationship with Kay (WTB Ex. 46), and he knew that the Commission wanted to know about their relationship. Tr. 143, 151, 156. Notwithstanding that knowledge, he claimed that it "wasn't necessary" to tell the Presiding Judge about their relationship. Tr. 143. This testimony is simply another example of Sobel's blatant disregard for his affirmative obligation to provide information the Commission needs to license him in the public interest. RKO General, Inc. v. FCC, supra.

16. Sobel's argument that he believed the agreement had been supplied to the Kay Presiding Judge is disingenuous. The Commission defers to the credibility findings of

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[3] Kay argues that consideration of anything other than the January 1995 affidavits is outside the scope of the issue added by the Presiding Judge. Kay Exceptions, p. 24. Since Kay did not object to the admission into evidence of the documents in question, Kay's objection is untimely. In fact, the events prior to the January 1995 affidavits put the affidavits in context. This evidence is needed to determine whether Sobel intended to conceal his relationship with Kay. If Sobel had provided the Commission with a copy of the management agreement and the details of his relationship with Kay in December 1994, that evidence would certainly be admissible to show that Sobel did not intend to conceal that information from the Commission. See Radio Station WABZ, Inc., 90 FCC 2d 818 ¶15 (1982). Conversely, Sobel's prior failure to disclose his relationship with Kay is relevant in determining his state of mind when he signed the affidavits.

administrative law judges unless such findings are in patent conflict with the record. Capitol City Broadcasting Company, 8 FCC Rcd 1726, 1736 (Rev. Bd. 1993). Here, there is ample evidence supporting the Presiding Judge's conclusion that Sobel's claim was not made in good faith. Upon examination by the Bureau, Sobel denied that it was necessary to explain his relationship with Kay to the Presiding Judge. Tr. 143, 156. It is inconsistent for a lay person to claim that it was unnecessary to provide something and then claim that the information was in fact provided. Second, by his own counsel's admission, Sobel was "not familiar" with the motion (Tr. 303), so he had no basis for claiming that the agreement was attached to the motion. Third, when the Presiding Judge subsequently questioned Sobel as to why he did not produce the agreement, he made no attempt to claim that it was not necessary because Kay had already done so. Instead, he testified (Tr. 303-304):

> JUDGE FRYSIAK: Getting back to what we had talked about, you indicated yesterday that you signed the agreement so that the Commission would be made aware of your relationship with Mr. Kay. That the agreement was signed in response to complaints that might have been filed against you and the Commission, about your relationship with Mr. Kay? If that was so important for you to do, why didn't you apprise the Commission of this agreement at the time that you signed it?
> THE WITNESS [Sobel]: The Commission doesn't -- maybe I'm speaking for them, but I had no anticipation of the Commission -- If I threw this piece of paper at the Commission and said, do something about it, they don't necessarily -- They're not obligated to respond to me. They're not obligated to do anything with it, necessarily.
> JUDGE FRYSIAK: It was at that time your applications were being held back, you said.
> THE WITNESS [Sobel]: There was -- I was stuck in the process through Mr. Kay's Designation Order. And there was nothing I could do to get out of this process. The management agreement --

17. The fact that Kay produced the agreement pursuant to an order of the Presiding Judge in the Kay case in March of 1995 is not evidence that Sobel acted in good faith.

Sobel's affidavit was being used in an attempt to remove Sobel's licenses from the Kay proceeding. If the Sobel licenses had been removed from the Kay hearing, there would have been no basis for producing the agreement in discovery in the Kay proceeding. Thus, since Sobel was offering his affidavit to help remove his licenses from the Kay hearing, he could not have had an expectation that the agreement would be produced in the Kay proceeding.

C. The Stanford Letter and Application Return Notices

18. The Presiding Judge found further evidence of Sobel's intent to deceive the Commission in Sobel's December 6, 1994 letter to Gary Stanford of the Commission's Gettysburg office (WTB Ex. 46). I.D., ¶75. While Sobel claimed that he was an "Independent Two Way Radio Dealer" (emphasis in original) and that he was not an employee of Kay, he provided no pertinent information concerning his relationship with Kay with respect to the Management Agreement stations. Sobel argues: "To expect that Sobel would, in this context, *sua sponte* spell out each and every detail of his business dealings with Kay is somewhat akin to expecting a parent to explain details of lunar geology to a child who has just announced that the man in the moon likes green cheese." Sobel Exceptions, p. 23. Sobel ignores the fact that it was a false statement for him to claim that he was "independent" when, with respect to the Management Agreement stations, he was anything but independent. Indeed, his continued claim at hearing that he was independent of Kay with respect to the Management Agreement stations (Tr. 157-159) is plainly untrue. Moreover, the idea that Sobel was required to explain his relationship with Kay to the Commission is hardly difficult to grasp. Sobel knew the Commission wanted that information. He had an obligation to provide that information. He claims the agreement was reduced to writing in order to explain

their relationship, but instead of providing that information, Sobel falsely claimed that he was "independent" and that Kay had no interest in any of his stations.[4]

III. UNAUTHORIZED TRANSFER OF CONTROL ISSUE

19. Sobel and Kay take exceptions to the Presiding Judge's conclusion that "it is abundantly clear that Kay has ultimate control of Sobel's Management Agreement stations" and that the parties therefore violated Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d). I.D., ¶68. Sobel and Kay argue that the Presiding Judge misapplied the factors listed in Intermountain Microwave, 24 FCC 983 (1963) to determine whether an unauthorized transfer of control had taken place and that the Presiding Judge ignored evidence showing that no transfer of control had taken place. Sobel Exceptions, pp. 9-17, Kay Exceptions, pp. 14-20. In fact, their arguments simply ignore or mischaracterize the record evidence. The Presiding Judge's findings of fact accurately reflect Kay's control over Sobel's stations, and his conclusions must be affirmed.

20. It is important to note what is not at issue in this case. The Bureau has never argued, and the Presiding Judge did not find, that management agreements involving SMR stations are *per se* violations of the Communications Act. Similarly, while Sobel describes his agreement with Kay as a "resale" or "channel capacity lease" agreement (Sobel Exceptions,

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[4] Kay's decision to conceal the fact that Kay was conducting the billing on Sobel's stations (WTB Exs. 19, 21, 23) is evidence of Kay's and Sobel's intention to conceal their relationship. Sobel can argue that Kay's role was not material to the subject of the inquiry at hand, but the fact remains that Kay took the step of concealing his role in billing customers on Sobel's stations. Furthermore, contrary to the argument at Sobel Exceptions, p. 24 n.28, there is more than sufficient evidence that Kay marked out the invoices when they were sent to the Commission (Tr. 337-339) and that Sobel knew the information was marked out when it was sent to the Commission (Tr. 238).

pp. 9-10), it is undisputed that *bona fide* resale agreements do not violate the Communications Act. The problem with the Kay - Sobel agreement is that it is much more than a simple resale or management agreement. In that regard, Sobel's reliance on Motorola, Inc., File Nos. 507505, et. al., (Chief, Private Radio Bureau, issued July 30, 1985) (Sobel Exceptions, pp. 11-12) is misplaced. The Bureau has never argued that it is impermissible for an SMR licensee to hire a manager to assist in operating the station. It is impermissible for a "manager" to have total control over a station's operation while the nominal licensee's role in the station's affairs is in the role of a contractor selected and paid by the manager. In Motorola, the licensee owned the equipment and had an independent financial obligation with a financing company. The agreement also specifically provided that Motorola would have to perform its functions pursuant to the licensee's supervision and instruction. See Motorola, Inc., supra, ¶19. In contrast, the only interest Sobel has in the equipment is Kay's permission to use Kay's equipment while the agreement is in effect. WTB Ex. 39, p. 3 (Paragraph IV A). Moreover, as noted below, Sobel has no financial obligations with respect to the Management Agreement stations, and Sobel works on the Management Agreement stations as Kay's contract technician. Kay holds *de facto* control over every aspect of the Management Agreement stations.

21. Both Sobel and Kay cite La Star Cellular Telephone Co., 9 FCC Rcd 7108, 7109 (1994) for the proposition that the factors listed in Intermountain Microwave, supra that are used in determining whether an unauthorized transfer of control have taken place are "useful guidelines" as opposed to a "exact formula." Sobel Exceptions, p. 11, Kay Exceptions, pp. 15-16. While Kay suggests that the Commission's observations in La Star were "[c]ontrary to

the initial decision" (Kay Exceptions, p. 15), both the Hearing Designation Order (Marc Sobel, 12 FCC Rcd 3298 (1997) (HDO)) in this case and the I.D. recognized "that actual control is the touchstone of the Intermountain test." I.D., ¶66, quoting HDO, ¶4. Moreover, since Kay and Sobel make their arguments based upon the six Intermountain factors, there is no basis for concluding that the I.D. is inconsistent with La Star. The six Intermountain factors are:

> (a) Does the licensee has [sic] unfettered use of all facilities and equipment?
> (b) Who controls daily operations?
> (c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
> (d) Who is in charge of employment, supervision, and dismissal of personnel?
> (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
> (f) Who receives monies and profits from the operation of the facilities?

Id. Each factor supports the conclusion that Kay controls the Management Agreement stations.

A. Does the licensee have unfettered use of all facilities and equipment?

22. While Sobel currently has access to the facilities and equipment, Sobel and Kay fail to note Kay's control over that access. Kay was the person who "selected, purchased, and provided all the equipment used in connection with the Management Agreement stations." I.D., ¶19. The management agreement provides that Kay shall be the sole supplier of equipment and labor needed to maintain the stations. Id. While Sobel does perform repair and maintenance work on the stations, he does so as a contractor selected and paid by Kay. WTB Ex. 25, Tr. 144. Thus, while Sobel currently has access to the equipment, most of that access is subject to Kay's control.

23. Sobel challenges the following findings of fact contained in ¶19 of the I.D.:

> Paragraph IV of the agreement provides that all equipment provided to Kay shall remain his sole and exclusive property. WTB Ex. 39, P. 3. The equipment was "leased" to Sobel for a term coterminous with the agreement, but Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. Id.

Sobel Exceptions p. 12. In fact, Paragraph IV A. of the management agreement provides:

> During the term of this agreement all equipment provided by Agent and leased by Licensee shall remain the sole and exclusive property of Agent. Nothing contained herein shall be interpreted to provide to Licensee any title, interest, or control over said equipment, except such use of the equipment as is specifically described herein.

WTB Ex. 39, p. 3. Sobel does not make any "lease payments" to Kay for the equipment - Kay is responsible for paying all expenses relating to the construction and operation of the stations. I.D., ¶46. Clearly, Sobel's interpretation of the record is contrary to his own agreement. Furthermore, as noted above, while Sobel currently works on the stations, Kay has the sole right to appoint someone else to work on those stations. Furthermore, while Kay is correct that Sobel has the keys necessary to access the sites and the equipment (Kay Exceptions, p. 16), Kay ignores his other means of controlling the equipment. Sobel's current access to and use of the equipment is subject to Kay's ultimate control.

B. Who controls daily operations?

24. In arguing that Sobel has ultimate control over daily operations of the Management Agreement stations both Sobel and Kay (Sobel Exceptions, pp. 13-14, Kay Exceptions, pp. 16-17) ignore or misstate critical record evidence. For example, neither party acknowledges that the management agreement names Kay as the sole and exclusive agent for both "the management of the Stations' transmitting facilities and associated business" and "the sale of all services provided by the Management Agreement stations." I.D., ¶22. Sobel has no

liability for contracts Kay enters into concerning the sale or management of the stations. Id. They also fail to mention that when Sobel performs any sort of work relating to the Management Agreement stations, he does so as a contractor selected and paid by Kay. Tr. 106, 144. Thus, when Sobel performs the functions listed by Sobel on page 13 of his exceptions, he does so as Kay's representative and under Kay's control. Similarly, Kay's summary claim that Sobel controls the placement of customers (Kay Exceptions, p. 17) ignores the Presiding Judge's detailed findings to the contrary at ¶¶24-25 of the I.D., which show that Kay's employees have a substantial role in placing customers on Sobel's stations, that Sobel's role in placing customers is as Kay's contractor, and that Sobel plays a role indistinguishable from his role with respect to Kay's stations.

25. Indeed, the Management Agreement stations are operated in a manner which is indistinguishable from stations licensed to Kay. Kay's salespeople do not know whether they are selling time on a station licensed to Kay or a station Kay manages. Tr. 343. For the large number of customers who use both stations licensed to Kay and the Management Agreement stations, the customers receive one consolidated bill unless the customer requests separate bills. Tr. 348-349. Sobel cannot tell from his invoices he provides to Kay what work was done on the Management Agreement stations and what work was done on stations licensed to Kay (Tr. 116), and the distinction makes no difference to Kay. Tr. 243. Sobel monitors Kay's stations just as often as he monitors the Management Agreement stations. Tr. 117. The daily operations of the Management Agreement stations are indistinguishable from the daily operations of stations licensed to and indisputably controlled by Kay.

26. Finally, Sobel relies on Paragraph VIII of the agreement, which states that Sobel

"shall retain ultimate supervision and control of the operation of the Stations." WTB Ex. 39, p. 5. That paragraph also gives Sobel a five day window to reject end user contracts if the rejection is "reasonable and based on the mutual interests of the parties" and a limited right to relocate a transmitter site if he can show that the relocation "is in the best interest of both Parties." Id. Nothing in those provisions demonstrate that Sobel exercises control of the Management Agreement stations. The general language that Sobel has ultimate supervision and control is contrary to the actual conduct of the parties and the specific provisions in the agreement which give Kay the exclusive right to sell service to customers, manage the stations, determine who repairs and maintains the stations, and negotiate contracts. The other provisions show that Sobel does not have the unfettered right to set prices or relocate sites. Instead, Sobel must be able to show that his action would be consistent with Kay's interests as well as his own. Accordingly, the Presiding Judge's conclusion that Kay controls the daily operations of the Management Agreement stations must be affirmed.

C. Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

27. The record shows that five types of policy decisions were made with respect to the Management Agreement stations: the preparation and filing of applications, the setting and negotiation of rates for customers, the clearing of channels, the buying and selling of stations, and retention of counsel. The Presiding Judge's findings of fact demonstrate that in each of those areas, Kay controlled the policy decisions. I.D., ¶¶30-43. Kay simply ignores the Presiding Judge's detailed factual findings and makes the bald unsupported claim that Sobel makes all the decisions. Kay Exceptions, p. 17. Sobel fails to address the Presiding Judge's findings concerning the clearing of channels, buying and selling of stations, and

retention of counsel. Therefore, the Presiding Judge's findings and conclusions that Kay controls these policy decisions (I.D., ¶¶37-41, 43, 67) are final.

28. Sobel argues that he controls the setting of rates and has ultimate control over the filing of applications. Sobel Exceptions, pp. 14-15. The evidence shows otherwise. Sobel's claim that "he personally determined when to make adjustments" to prices (Sobel Exceptions, p. 14) is not supported by the transcript citation at Tr. 123. Indeed, as the Presiding Judge found at ¶42 of the I.D., Kay has the sole right to negotiate contracts with customers, Kay charges the same rates for his 800 MHz stations as he does for the Management Agreement stations, and Kay or his employees do the majority of the negotiating with customers, and Sobel does not even know whose idea it was to change the standard rates charged on those stations when the last changes was made. With respect to the filing of applications, Sobel argues that Kay was merely the type of application consultant often used by FCC licensees. Sobel Exceptions, pp. 14-15. In fact, Kay was far more than a consultant. Kay not only prepared the paperwork but made the decisions that needed to be made with respect to the applications. He located the frequencies which were to be applied for, determined the transmitter sites to be used, prepared the applications, prepared the forms for use by the frequency coordinator, and prepared responses to application return notices for Sobel's applications. Kay also made (with one exception) the arrangements with property owners to make sure the sites would be available. I.D., ¶¶30-36. While Sobel did review and sign the applications (I.D., ¶35), that ministerial role hardly constitutes control over the decisions concerning application filings. Indeed, the only edits Sobel could remember making to the applications was the misspelling of his name. Tr. 75.

29. Kay's control over the buying and selling of "Sobel" stations shows the extent of his control over the Management Agreement stations. Three of the Management Agreement licenses were obtained through assignment. Tr. 101. Kay made the arrangements for Sobel to acquire those licenses. Id. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). Tr. 102. Three stations subject to the Management Agreement that have been sold. Tr. 126. One station was sold to William Matson for between $70,000 and $100,000. Tr. 126, 366. Kay arranged for the sale of that station. Tr. 366. Sobel received $20,500 from that sale, and Kay received the balance of the money. Tr. 126-127, 366-367. Sobel asked Kay for $20,000, and Kay agreed. Tr. 374. With respect to the second station that was sold, Sobel only received $500; Sobel does not know how much money the second station was sold for. Tr. 127-128. The third station was sold as part of a trade, so no money was exchanged. Tr. 127. The Presiding Judge therefore correctly concluded that Kay made the policy decisions concerning the Management Agreement stations.

D. Who is in charge of employment, supervision, and dismissal of personnel?

30. The Presiding Judge concluded that "Kay controls the hiring and firing of personnel to operate the Management Agreement stations." I.D., ¶67. Sobel and Kay argue that this factor is inapplicable because Sobel is a sole proprietor and because while Kay's employees perform various tasks relating to the Management Agreement stations, they are not station employees. Sobel Exceptions, p. 15, Kay Exceptions, p. 18. That argument is pure sophistry. Kay's employees perform all sorts of functions relating to the management agreement stations. See I.D., ¶¶44-45. The Intermountain factor asks who is in charge of